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In The

Supreme Court of the United States

October Term, 1997

RONALD K. GRUBBS,

Petitioner,

v.

HARRY K. SINGLETARY, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES E. FELMAN
Counsel of Record
STUART C. MARKMAN
SUSAN H. FREEMON
KYNES, MARKMAN & FELMAN, P.A.
Post Office Box 3396
Tampa, Florida 33601-3396
(813) 229-1118

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether a criminal defendant's Sixth Amendment right to appellate counsel is abridged by the filing of a brief pursuant to *Anders v. California* where the issue of ineffective assistance of trial counsel on the face of the trial record is not only non-frivolous, but meritorious.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ronald K. Grubbs respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals, entered in the above-entitled proceeding on August 29, 1997.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, page 1) is reported at 120 F.3d 1174. The opinion of the district court (App., *infra*, page 10) is reported at 892 F. Supp. 1484. The district court's denial of the motion for reconsideration (App., *infra*, page 16) is reported at 900 F. Supp. 425.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on August 29, 1997. On December 5, 1997, the Eleventh Circuit Court of Appeals denied a petition for panel rehearing and suggestion of rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This appeal presents the startling and seemingly simple question of whether the Sixth Amendment prohibits the state of Florida from imprisoning a man for the rest of his life while denying him the effective assistance of

counsel both at trial and on direct appeal. It arises from the case of a defendant who received a life sentence after a trial at which his own attorney introduced the most devastating evidence against him, followed by an appeal in which his appellate attorney filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), urging the affirmance of his conviction and life sentence. Although the Eleventh Circuit Court of Appeals did not question the express findings of the district court that Ronald Grubbs received ineffective assistance of trial counsel, that this ineffectiveness was apparent from the face of the trial record, and that the *Anders* brief filed on behalf of Mr. Grubbs omitted any mention of that issue or any reference to the points in the record at which it was apparent, the circuit court nevertheless determined that Grubbs' right to appellate representation had not been denied him because the issue of ineffective assistance of counsel could be raised on collateral attack.

A detailed statement of the facts regarding Grubbs' trial is set forth below because it is essential to a full appreciation of the circuit court's decision that the Constitutional right to the effective assistance of counsel has been satisfied by the *Anders* brief filed in this case. The case arose from an accusation that Grubbs committed a sexual offense against an eleven-year-old girl. Grubbs was convicted and sentenced to life imprisonment following a trial which, from jury selection through verdict and sentencing, consumed a single day. The numerous and repeated instances of ineffectiveness by Grubbs' trial attorney which are apparent from the face of the record, as determined by the district court, fall into two general categories: (1) the introduction by defense counsel (and

failure to object to the state's reintroduction) of highly prejudicial evidence that Grubbs had committed a prior similar bad act, and (2) trial counsel's elicitation and failure to object to devastating hearsay testimony by multiple witnesses recounting the victim's version of the offense.

Although his client was charged with a felony carrying a mandatory penalty of life imprisonment, Grubbs' trial attorney gave an opening statement which occupies slightly more than a single page of the record. In his opening, the defense attorney took the bold but questionable approach of telling the jury he would prove that the alleged crime came to the attention of the police because Grubbs had on a different occasion tried to kiss *another* young girl. Grubbs' attorney further told the jury the uncharged incident was critically important because he would prove the alleged victim in this case fabricated the allegations at issue in the trial in response to learning about this other incident.

The state did not offer any evidence regarding Grubbs' alleged attempt to kiss another girl in its case in chief. Instead, following up on his brief opening statement, it was Grubbs' own attorney who elicited evidence of this prior bad act through double hearsay testimony of a defense witness. After defense counsel had opened the door, the state took full advantage of this evidence during cross-examination, pointing out the similarities between the alleged prior bad act and the crime of which Grubbs was accused. Grubbs' attorney did not object to the state's elicitation of this double hearsay prior bad act testimony.

What is truly remarkable about this case is that trial counsel, having introduced prior bad act evidence about his client in furtherance of the promise in his opening statement to show how the alleged victim came to fabricate her accusations, and having proved it through otherwise inadmissible double hearsay testimony of a defense witness, *never attempted to connect this prior bad act testimony to any exculpatory explanation, evidence, or theory of any kind*. Although the supposed defense theory was that the alleged victim fabricated her accusation in response to talking to the victim of this other bad act by Grubbs, the evidence actually presented by Grubbs' attorney at trial did not establish that the two alleged victims had ever met or heard of each other. Defense counsel did not bother to ask the alleged victim whether she had heard about the other supposed bad act by Grubbs. Indeed, even the possibility that the defense theory could be true was defeated by evidence that the other incident allegedly happened nearly six months *after* the alleged victim raised the allegations regarding the offense at issue. Having promised in his opening statement to prove Grubbs' innocence through his prior bad act, the entirety of defense counsel's closing argument concerning the prior bad act "defense" evidence consists of the following two sentences: "[the other alleged victim] says 'Ronnie tried to kiss me.' I really don't know what that means." Meanwhile, the state again capitalized on the prior bad act evidence in its closing argument, hammering on the suggestion that if Grubbs were guilty of this other bad act, he must therefore be guilty of the charged offense as well.

The district court found that Grubbs' trial counsel was also ineffective in his treatment of hearsay testimony regarding what the victim had told various other witnesses about the alleged events. Not only did Grubbs' trial counsel fail to object to the prosecutor's elicitation of such testimony in both his case in chief and on cross examination, but defense counsel himself also elicited hearsay testimony from both state and defense witnesses regarding what the alleged victim had said. As a result, the jury heard testimony from three different hearsay witnesses recounting the victim's version of events seven different times.

Following Grubbs' conviction and life sentence, the public defender's office was appointed to Grubbs' appeal. Without either communicating with Grubbs or attempting to discuss the appeal with him, the public defender filed an *Anders* brief on his behalf. The *Anders* brief does not argue – or refer to those portions of the record which relate to – any of the instances of ineffective assistance by Grubbs' trial counsel noted by the district court. Indeed, the public defender did not even consider the issue. Instead, the public defender recited in her brief:

> After examining Appellant's case, including a thorough reading of the record on appeal and a review of the law on arguable points, the undersigned counsel concludes there is no meritorious argument to support the contention *that the trial court committed reversible error*. Consequently, the undersigned appellate counsel requests permission of the court to withdraw as counsel of record in this case pursuant to *Anders v. California*, 386 U.S. 738 (1967). Appellate counsel has written Appellant advising him of this

> brief and enclosing a copy of the brief and the record on appeal.

The public defender did not state that any possible appellate issues would be frivolous, or that she had even considered whether there might be potentially meritorious appellate issues which did not involve rulings by the trial court, such as the ineffectiveness of Grubbs' trial counsel.

Upon receipt of the *Anders* brief, the state appellate court did not rule on the public defender's motion to withdraw or indicate that it had conducted an independent review of the record. Instead, the court upheld Grubbs' conviction and life sentence in a one-word *per curiam* opinion which stated: "Affirmed."

Petitioner's *pro se* state petitions for writs of habeas corpus and motions for state post-conviction relief were denied. Grubbs also filed two *pro se* federal petitions for writs of habeas corpus, each of which was dismissed to allow him to exhaust his state remedies.

Assisted by counsel, Grubbs filed a third federal petition for a writ of habeas corpus, alleging several grounds. In the portion of the petition granted by the district court, Grubbs sought habeas relief on the ground that he was denied his constitutional right to the assistance of counsel on his direct appeal because his appointed attorney filed an *Anders* brief even though it is apparent on the face of the record that his trial counsel had rendered ineffective assistance of counsel. After reviewing the single volume transcript of Grubbs' trial, the district court held that "the failure of trial counsel to

object to hearsay, his eliciting of hearsay testimony implicating the accused on direct examination, and introduction of prior bad act evidence against Grubbs, all constitute instances of ineffective assistance of trial counsel." *Grubbs v. Singletary*, 892 F. Supp. 1184, 1490 (M.D. Fla. 1995). Notwithstanding this meritorious issue apparent from the face of the record, the court stated, Grubbs' appellate counsel had filed an *Anders* brief that never "came close to even hinting at the genuine grounds for appeal which were apparent in the trial transcript." *Id.* at 1491. The district court therefore determined that Grubbs' appellate counsel had been ineffective and had failed to comply with the requirements of *Anders*. *Id.* at 1490-91.

The state moved for reconsideration of this order, which the district court denied in a second written order. In its second order, the district court again found that the "claim of ineffective assistance of counsel was not frivolous" and that "in light of the ineffectiveness apparent on the record, appellate counsel should have pursued this claim." *Grubbs v. Singletary*, 900 F. Supp. 425, 427 (M.D. Fla. 1995).

In its appeal to the Eleventh Circuit, the state made no argument that the *Anders* brief referred to those portions of the record which contain the instances of ineffective assistance by trial counsel. The state similarly did not claim that the ineffective assistance of Grubbs' trial counsel was a frivolous appellate issue. Instead, the state asserted that because claims of ineffective assistance of counsel may be raised on collateral attack, it is permissible to handle the direct appeal by an *Anders* brief which does not refer to the issue.

The Eleventh Circuit Court of Appeals agreed with the state's position and reversed the district court's partial grant of the writ of habeas corpus. The circuit court's opinion did not question the district court's holdings that (1) Grubbs' trial counsel was ineffective on the face of the record; (2) this issue, if raised on direct appeal, would be meritorious; and (3) the *Anders* brief submitted by Grubbs' appellate counsel did not discuss this meritorious issue. Instead, the Eleventh Circuit concluded that because this claim could also be raised by collateral attack, the submission of the *Anders* brief did not violate Grubbs' right to appellate counsel. *Grubbs*, 120 F.3d at 1177.

REASONS FOR GRANTING THE PETITION

The essence of the holding of Eleventh Circuit Court of Appeals in this case is that an indigent criminal appellant's Sixth Amendment right to counsel is satisfied by an *Anders* brief even though a non-frivolous appellate issue exists, so long as that issue may be raised on collateral attack. The decision of the Eleventh Circuit is erroneous under this Court's decisions in *Anders v. California*, 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988). Moreover, it conflicts with every interpretation ever given to those cases by any circuit court. The issue addressed by the court of appeals' decision is important because direct appeal is the only stage of the post-conviction process during which the criminal appellant is guaranteed the assistance of counsel.

I. The Eleventh Circuit's Decision Conflicts with This Court's Decisions in *Anders v. California* and *Penson v. Ohio* and with the Interpretation of Those Cases by Every Other Circuit.

It is a settled and unambiguous rule of law that where there exists a non-frivolous appellate issue, the filing of an *Anders* brief constitutes a violation of a criminal appellant's right to counsel. *Anders v. California*, 386 U.S. 738, 744 (1967); *Penson v. Ohio*, 488 U.S. 75, 84 (1988). From this straightforward rule, the Eleventh Circuit Court of Appeals has carved out an exception. For the first time in any jurisdiction, the Eleventh Circuit has held that an *Anders* brief may be filed notwithstanding the existence of an appellate issue which is not only non-frivolous, but is actually meritorious. This determination is inconsistent with this Court's decisions in *Anders* and *Penson*.

The Fourteenth Amendment "guarantees a criminal appellant the right to counsel on a first appeal as a right." *Penson*, 488 U.S. at 79 (citing *Douglas v. California*, 372 U.S. 353 (1963)). The Court has recognized, however, the potential conflict between the criminal appellant's right to counsel and the attorney's "ethical obligation to refuse to prosecute a frivolous appeal." *McCoy v. Wisconsin*, 486 U.S. 429, 435-36 (1988). In *Anders*, the Court determined that the conflicting obligations raised when an appellate attorney determines that all potential appellate issues are "wholly frivolous" may each be satisfied by the appellate attorney's making a motion to withdraw accompanied by the filing of what has come to be known as an *Anders* brief. *Anders*, 386 U.S. at 744. The court then makes its own examination of the record and rules on the attorney's motion to withdraw. *See id.*

Before the appellate attorney makes the decision to file an *Anders* brief, that attorney must "master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal." *McCoy*, 486 U.S. at 438. "In searching for the strongest arguments available, the attorney must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client." *Id.* at 444. Only after a diligent search of the record has revealed that any appellate issues would be entirely frivolous may the appellate attorney file a motion to withdraw and an *Anders* brief. *Id.* at 438-39.

Where there are non-frivolous appellate arguments, the filing of an *Anders* brief cannot satisfy the constitutional right to representation. The exception to the criminal appellant's right to counsel on appeal recognized in *Anders* "is predicated on the fact that the Fourteenth Amendment – although demanding active and vigorous appellate representation of indigent criminal defendants – does not demand that states require appointed counsel to press upon the appellate courts wholly frivolous arguments." *Penson*, 488 U.S. at 84. For this reason, the exception does not apply if the "trial record supports arguable claims"; when that is the case, there is a "constitutional imperative" that the criminal appellant's appeal be advanced by counsel. *Id.* The only function of an *Anders* brief is "to enable the court to decide whether the appeal is so frivolous that the defendant has no federal right to have counsel present his or her case to the court." *McCoy*, 486 U.S. at 439 n.13. It cannot suffice to replace "an advocate's brief on the merits." *Id.* An *Anders* brief therefore does not satisfy the "constitutional imperative"

recognized by *Anders* and *Penson* that the criminal appellant whose case presents any potential appellate arguments be represented by counsel on appeal.

Unlike an ordinary case of ineffective assistance of appellate counsel, where an appellate attorney has failed to comply with the requirements of *Anders*, nothing more is required to demonstrate that the appellant should receive a new direct appeal. *Penson*, 488 U.S. at 88. Where the only action taken on behalf of a criminal appellant is the filing of an *Anders* brief, the appellant is left "completely without representation during the appellate court's actual decisional process." *Id.* Because the "[a]ctual or constructive denial of counsel altogether is legally presumed to result in prejudice," the general requirement that the appellant demonstrate that his counsel's ineffectiveness prejudiced his defense does not apply where an *Anders* brief has been filed in the face of meritorious appellate issues. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)) (alteration in original).

The court of appeals erred in interpreting *Anders* and *Penson* to allow an *Anders* brief even though competent research into the facts and law would have presented non-frivolous issues for appeal. If Grubbs' appellate counsel had researched Florida law, she would have found that a claim for ineffective assistance of counsel, while ordinarily raised on collateral attack, may be made on direct appeal if it is apparent from the record. *See Stewart v. State*, 420 So. 2d 862, 864 (Fla. 1982); *Gordon v. State*, 469 So. 2d 795, 797 (Fla. Dist. Ct. App. 1985). The Court made clear in *Anders* that the denial of appellate counsel violates the criminal appellant's right to counsel

unless every potential appellate issue is "wholly frivolous." *Anders*, 368 U.S. at 744. In the face of a non-frivolous appellate issue apparent from the record, this failure to provide Grubbs with representation violated his constitutional right to counsel. *See id.*; *see also Penson*, 488 U.S. at 84.

The court of appeals' holding is at odds not only with this Court's decisions in *Anders* and *Penson*, but also with every interpretation of these decisions by the other circuits. Every other circuit that has discussed the circumstances in which an *Anders* brief may be filed has stated that counsel may submit an *Anders* brief only if every appellate issue is wholly frivolous. *See, e.g., Robbins v. Smith*, 125 F.3d 831, 835 (9th Cir. 1997); *United States v. Tabb*, 125 F.3d 583, 585 (7th Cir. 1997); *United States v. Ibrahim*, 62 F.3d 72, 73 (2d Cir. 1995); *United States v. Condren*, 18 F.3d 1190, 1993 n.8 (5th Cir. 1994); *United States v. Humphrey*, 7 F.3d 1186, 1191 (5th Cir. 1993); *United States v. Burnett*, 989 F.2d 100, 103 (2d Cir. 1993); *United States v. Eggen*, 984 F.2d 848, 850 (7th Cir. 1993); *Lofton v. Whitley*, 905 F.2d 885, 887 (5th Cir. 1990); *United States v. Griffy*, 895 F.2d 561, 562 (9th Cir. 1990); *Lombard v. Lynaugh*, 868 F.2d 1475 (5th Cir. 1989); *Sanders v. Clarke*, 856 F.2d 1134, 1136 (8th Cir. 1988); *Freels v. Hills*, 843 F.2d 958, 964 (6th Cir. 1988); *Nell v. James*, 811 F.2d 100, 103-04 (2d Cir. 1987). As the Seventh Circuit recently explained, "[t]he filing of a brief in which the appellant's lawyer asks to be let out of the case because the appeal is frivolous can hardly be considered a discharge of the duty to provide the defendant with assistance of counsel if the appeal is not frivolous." *Eggen*, 984 F.2d at 850; *see also Condren*, 18 F.3d at 1993 n.8 ("[U]nder *Anders*, counsel

has an affirmative duty to advise the court of *any* non-frivolous issues."). Prior to the Eleventh Circuit's decision in *Grubbs*, no circuit had found any exception to the requirement that the criminal appellant be represented by counsel if there are any non-frivolous appellate issues.

The Eleventh Circuit's decision to treat ineffective assistance of trial counsel differently from all other appellate issues appears to rest on the proposition that such claims are typically, although not necessarily, raised by collateral attack. *See Grubbs*, 120 F.3d at 1177. In this regard, the circuit court relied on *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987), a case in which the Florida Supreme Court declined to find appellate counsel ineffective for failing to raise, among other issues, ineffective assistance of trial counsel. The Eleventh Circuit's reliance on *Blanco* is misplaced, however, because *Blanco* was not an *Anders* case. As this Court recognized in *Penson*, there are important differences between an *Anders* case in which *no* assertedly non-frivolous issues were raised and counsel suggested affirmance of the conviction and sentence and a case like *Blanco* where the claim of ineffective assistance of appellate counsel is made because some but not all possible non-frivolous issues have been raised. In the former situation, the appellant is completely denied representation on appeal. *See Penson*, 488 U.S. at 88. Where there are meritorious appellate issues, this denial alone is enough to violate the appellant's constitutional right to counsel. *See id.*

The notion that Grubbs enjoyed his Constitutional right to counsel in this case is impossible to accept. At each stage of the process, Grubbs would literally have

been better off without any counsel at all. His trial counsel repeatedly introduced prior bad act and hearsay testimony against him without ever connecting it to any argument or defense. The *Anders* brief suggesting affirmance of Grubbs' conviction and life sentence also did more harm than good. As described by the district court, the *Anders* brief "reads more like an amicus brief for the state than one for her client." *Grubbs*, 892 F. Supp. at 1490 n.1. It is therefore respectfully submitted that the process by which Grubbs' guilt was determined and affirmed cannot be squared with this Court's precedent or with any reasonable concept of a Constitutional right to the effective assistance of counsel.

II. The Question Presented Is of Extreme Importance Because Direct Appeal Is the Only Stage of the Post-Conviction Process at Which an Indigent Criminal Defendant Is Afforded the Assistance of Counsel.

The Eleventh Circuit's decision raises a question of extreme importance because appellate counsel is the *only* counsel afforded a convicted indigent to seek relief from the devastating effects of ineffective assistance of trial counsel. Although an indigent criminal defendant may raise ineffectiveness of trial counsel through collateral attack, as Grubbs with his eighth grade education ineptly tried to do in this case, there exists no right to the assistance of counsel on collateral attack. Left uncorrected, the circuit court's opinion means that in cases such as this, where the ineffectiveness of the defendant's trial counsel is so shocking that it is obvious and undeniable from the face of the record, the Constitutional right

to appellate counsel is satisfied by the filing of a brief suggesting affirmance of the conviction. In other words, the Eleventh Circuit has effectively held that the Constitutional right to counsel may be denied both at trial and on appeal, so long as defendants like Grubbs are permitted to complain about it while imprisoned for life through a collateral attack armed with an eighth grade education and without the assistance of counsel. This cannot be what the Framers had in mind when they wrote, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend VI.

This Court has recognized the extreme importance of guaranteeing that criminal appellants are provided with counsel, not only for the sake of the appellant's constitutional rights, but also to ensure the integrity of our system of justice. "The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth – as well as fairness – is 'best discovered by powerful statements on both sides of the question.' " *Penson*, 488 U.S. at 84 (quoting Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975)). The procedures found in *Anders* to be necessary to ensure that this right is not violated do not grant indigent criminal appellants any special protections, but merely "assure penniless defendants the same rights and opportunities on appeal . . . as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." *Anders*, 386 U.S. at 499.

It is particularly important for this Court to take this opportunity to ensure that criminal appellants receive the

rights that are guaranteed them by the Sixth and Fourteenth Amendments in light of the fact that the Eleventh Circuit's decision in this case joins the Seventh Circuit's recent decision in *United States v. Wagner*, 103 F.3d 551 (7th Cir. 1997), in eroding the standards set by *Anders*. This Court held that once an *Anders* brief has been filed, it is up to the appeals court "after a full examination of all of the proceedings, to decide whether the case is wholly frivolous." *Anders*, 386 U.S. at 744. In spite of this clear requirement that the appellate court conduct its own examination of the record before granting the appellate attorney's motion to withdraw, the Seventh Circuit Court of Appeals has now stated that it will no longer do so. *Wagner*, 103 F.3d at 553. Instead, if the Seventh Circuit determines that the *Anders* brief is "adequate on its face," the court will henceforth be required only to examine those portions of the record "that relate to the issues discussed in the brief." *Id.* By creating an exception to the requirement that *Anders* briefs may be filed only when every appellate issue is wholly frivolous, the Eleventh Circuit's holding in this case surpasses the Seventh Circuit, and erodes to an unacceptable degree the Constitutional guarantee of effective appellate representation.

Appellate counsel is the last counsel to which an indigent defendant is entitled. Because the *Anders* procedure permits the removal of appellate representation, the requirements of *Anders* should be rigorously enforced and scrupulously protected. To the extent that *any* exception should be made to the rule allowing *Anders* briefs only when every appellate issue would be frivolous, cases in which the defendant's trial counsel was so shockingly ineffective that it is obvious on the face of the record should hardly be placed at the top of the priority

list. This is, in any event, a question of exceptional importance warranting the consideration of this Court.

CONCLUSION

The Eleventh Circuit's holding that Ronald Grubbs' constitutional right to counsel on appeal was satisfied by the filing of an *Anders* brief in the face of a meritorious appellate issue conflicts with this Court's decisions in *Anders* and *Penson* and with the decisions of the other circuits. The question presented by this case is of extreme importance because criminal appellants are guaranteed the right to appellate counsel only at the direct appeals stage. The danger of allowing this decision to stand could not be better demonstrated than by what has occurred in this case: an indigent criminal defendant who was without question denied effective representation both at trial and on appeal has nevertheless been condemned to spend the rest of his life in prison.

Respectfully submitted,

JAMES E. FELMAN
Florida Bar No. 775568
Counsel of Record

STUART C. MARKMAN
Florida Bar No. 322571
SUSAN H. FREEMON
Florida Bar No. 344664
KYNES, MARKMAN & FELMAN, P.A.
Post Office Box 3396
Tampa, Florida 33601-3396
(813) 229-1118
Attorneys for Petitioner

Ronald Keith GRUBBS, Petitioner-Appellee, Cross-Appellant,

v.

Harry K. SINGLETARY, Jr., Respondent-Appellant, Cross-Appellee.

No. 95-3421.

United States Court of Appeals, Eleventh Circuit.

Aug. 29, 1997.

Katherine Vickers Blanco, Department of Legal Affairs, Tampa, FL, for Petitioner-Appellee, Cross-Appellant.

James E. Felman, Tampa, FL, Respondent-Appellant, Cross-Appelee [sic].

Appeals from the United States District Court for the Middle District of Florida.

Before COX, Circuit Judge, KRAVITCH, Senior Circuit Judge, and STAGG*, Senior District Judge.

COX, Circuit Judge:

Harry K. Singletary, Secretary of Florida's Department of Corrections, appeals the district court's grant of habeas relief to Ronald Keith Grubbs on his claims of ineffective assistance of appellate counsel and state court failure to comply with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Grubbs cross-appeals the district court's denial of habeas relief on his claim of

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* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

ineffective assistance of trial counsel. We reverse the grant of relief and affirm the denial of relief.

I. BACKGROUND

Grubbs was convicted in a Florida state court of committing sexual battery and lewd and lascivious acts on a child. He was sentenced to a twenty-five-year minimum mandatory term and a concurrent fifteen-year term.

The offenses occurred at Grubbs's home where the victim, Veronica Rene Daggett, was visiting her friend Sunny Russ. In a videotaped statement, Daggett testified that after she had fallen asleep next to Russ on a couch, Grubbs carried her into Russ's bedroom, touched her breasts, pulled down her underwear, touched her vagina with his hand, and "put his finger in her bottom." Daggett further testified that the offenses occurred on a conventional single bed with a mattress.

Counsel was appointed to aid Grubbs in appeal of his convictions. However, the appointed counsel moved Florida's Second District Court of Appeal for permission to withdraw on the ground that no reversible errors were committed during the trial. Pursuant to *Anders,* counsel also filed a brief directing the court's attention to four arguable grounds for appeal and provided Grubbs with a copy of the brief and the record on appeal. Grubbs in turn filed a pro se brief to supplement the *Anders* brief. The Second District Court of Appeal entered a *per curiam* order affirming the convictions without opinion. *Grubbs v. State,* 547 So.2d 1214 (Fla. 2d DCA 1989).

Grubbs then filed in the Second District Court of Appeal a pro se Petition for a Writ of Habeas Corpus alleging ineffective assistance of appellate counsel in connection with the filing of the *Anders* brief. This petition, along with a second petition alleging improper denial of a motion to supplement the record on direct appeal, was denied.

Grubbs next filed in the trial court a pro se motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 in which he alleged ineffective assistance of trial counsel. The trial court denied the motion without an evidentiary hearing and the Second District Court of Appeal affirmed without opinion.

Grubbs subsequently filed two separate petitions for habeas relief in the federal district court. After the district court dismissed both petitions without prejudice to enable Grubbs to exhaust his state remedies, Grubbs filed the habeas petition involved in this appeal.

The petition claims that (1) Grubbs's trial counsel was ineffective in failing to introduce into evidence an installment sales agreement for the purchase of a waterbed to support Grubbs's claim that he owned the waterbed on the date when the offenses were alleged to have occurred; (2) Grubbs's trial counsel was ineffective in failing to object to inadmissible hearsay testimony and in eliciting hearsay and "similar act" testimony; (3) Grubbs's appellate counsel was ineffective in filing the *Anders* brief; and (4) the Second District Court of Appeal did not comply with *Anders* when it failed to explicitly rule on appellate counsel's motion to withdraw and when

it failed to make an explicit determination as to whether the appeal was frivolous.

Following an evidentiary hearing, the district court denied habeas relief as to Grubbs's first and second claims. However, it granted habeas relief as to Grubbs's third and fourth claims, and accordingly directed the Second District Court of Appeal to grant Grubbs the opportunity for a new appeal. *See Grubbs v. Singletary*, 892 F.Supp. 1484, 1491 (M.D.Fla.1995). Both parties noticed appeal.

II. DISCUSSION

A. Issues Raised By Singletary

The first issue raised by Singletary is whether the district court erred in granting habeas relief based upon Grubbs's claim of ineffective assistance of appellate counsel in filing the *Anders* brief. We review this issue *de novo* since it presents a mixed question of law and fact. *See Duest v. Singletary*, 967 F.2d 472, 477 (11th Cir.1992).

Generally, an ineffective assistance of appellate counsel claim is analyzed under the two-prong test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir.1991). The test requires a defendant to show both that (1) appellate counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *See id.* However, a number of courts have held that in an *Anders* context, where appellate counsel must submit a brief advising the court of anything in the record that is arguably meritorious, a defendant need not

satisfy the prejudice prong. *See, e.g., Evans v. Clarke,* 868 F.2d 267, 268 (8th Cir.1989). Rather, the defendant need only show that appellate counsel was deficient in failing to comply with *Anders.*

The district court concluded that Grubbs's appellate counsel was deficient in failing to comply with *Anders* since her brief (1) did not advise the court of a claim of ineffective assistance of trial counsel; and (2) did not present other arguably meritorious claims in the manner of an advocate. *See Grubbs,* 892 F.Supp. at 1490-91. The district court then concluded, without requiring a showing of prejudice, that these omissions rendered appellate counsel's performance constitutionally ineffective.

Without deciding whether the district court was correct in not requiring a showing of prejudice, we conclude that the district court erred in concluding that Grubbs's appellate counsel's [sic] was deficient in failing to comply with *Anders.*

Grubbs's appellate counsel's failure to advise the court of a claim of ineffective assistance of trial counsel in the *Anders* brief does not amount to deficient performance since such a claim generally is not susceptible to review on direct appeal. *See Blanco v. Wainwright,* 507 So.2d 1377, 1384 (Fla.1987). In fact, Grubbs's counsel in this appeal stated at oral argument that he could not find *any* Florida cases in which counsel raised an ineffective assistance of trial counsel claim on direct appeal. The absence of any such case likely is due to the fact that defendants can raise an ineffective assistance of trial counsel claim in a motion for post-conviction relief under

Rule 3.850, which has been recognized as a "more effective" remedy for such claims than direct appeal since the resolution of a Rule 3.850 motion, unlike a direct appeal, allows for a full evidentiary hearing. *See id.*[1] Grubbs's appellate counsel "cannot be faulted for preserving the more effective remedy and eschewing the less effective." *Id.*

Similarly, the way in which counsel crafted her *Anders* brief did not in our view constitute constitutionally deficient performance. The brief contained a thorough statement of facts and four arguably meritorious claims with accompanying relevant authority. Although the brief may have only marginally complied with *Anders*, it nonetheless complied. We conclude, therefore, that the district court erred in granting Grubbs relief on his claim of ineffective assistance of appellate counsel in failing to compiy with *Anders*.

The second issue raised by Singletary is whether the district court erred in effectively concluding that Grubbs's claim that the Second District Court of Appeal did not follow *Anders* was not procedurally defaulted. We review this issue de novo. *See Tower v. Phillips*, 7 F.3d 206, 210 (11th Cir.1993).

Federal courts may not grant relief on claims "that have not been presented in state court if the state court would have found the claims to be procedurally defaulted, unless the petitioner is able to show both cause

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[1] Grubbs, in fact, claimed ineffective assistance of trial counsel in the Rule 3.850 motion that he filed after his direct appeal.

for the default and prejudice resulting therefrom." *See id.* The district court did not determine whether Grubbs's claim that the Second District Court of Appeal did not follow *Anders* was procedurally defaulted. Instead, it merely concluded that the claim was "effectively linked" to Grubbs's claim of ineffective assistance of appellate counsel since both involved the procedural requirements of *Anders.*

This conclusion erroneously sidesteps the important issue of procedural default. Had the district court addressed the issue, it likely would have concluded, as we conclude, that Grubbs procedurally defaulted his claim since he did not raise it in the state courts and would be procedurally barred from doing so in a second or successive motion or petition. *See Johnson v. Singletary,* 647 So.2d 106, 109 (Fla.1994)("[N]ew claims [cannot] be raised in a second petition when circumstances upon which they are based were known or should have been known at the time the prior petition was filed."). Further, we conclude that Grubbs has failed to show sufficient cause to overcome the default.

It is unclear whether the district court's grant of relief was based to any extent on Grubbs's claim that the Second District Court of Appeal failed to comply with *Anders* since the district court did not make any specific findings with regard to the merits of the claim. However, if the grant of relief was based on the court's alleged failure to comply with *Anders,* such a grant was improper since the claim was procedurally defaulted and Grubbs did not show sufficient cause to overcome the default.

B. Issue Raised By Grubbs

The issue raised by Grubbs on cross-appeal is whether the district court erred in denying him relief on his ineffective assistance of trial counsel claim because of his procedural default. We review this issue de novo. *See, Tower,* 7 F.3d at 210.

As stated above, federal courts may not address claims "that have not been presented in state court if the state court would have found the claims to be procedurally defaulted, unless the petitioner is able to show both cause for the default and prejudice resulting therefrom." *See id.* With regard to Grubbs's ineffective assistance of trial counsel claim, the district court conducted a procedural default analysis and concluded that Grubbs did not present to the state courts the specific instances of alleged ineffective assistance of trial counsel he now presents, and would be precluded from presenting them in a successive state motion. *See Grubbs,* 892 F.Supp. at 1488-89 (citing *Spaziano v. State,* 545 So.2d 843, 844-45 (Fla.1989)). The district court further concluded that Grubbs failed to show cause to excuse such a default. *Id.*

Grubbs argues that he has shown sufficient cause. According to Grubbs, his failure to raise the specific instances of ineffective assistance of trial counsel in his Rule 3.850 motion was caused by appellate counsel's failure to raise the instances on direct appeal. We reject this argument since, as the district court noted, there is no logical connection between appellate counsel's failure to raise the instances on direct appeal and Grubbs's failure to raise the instances in his Rule 3.850 motion. Therefore, we conclude that the district court did not err in

denying Grubbs relief on his ineffective assistance of trial counsel claim because of his procedural default.

III. CONCLUSION

For the above reasons, we REVERSE the district court's grant of relief on Grubbs's claims of ineffective assistance of appellate counsel and state court failure to comply with *Anders,* and AFFIRM the district court's denial of relief on Grubbs's claim of ineffective assistance of trial counsel.

REVERSED IN PART; AFFIRMED IN PART.

Ronald K. GRUBBS, Petitioner,

v.

Harry K. SINGLETARY, Jr., Secretary, Department of Corrections, State of Florida, Respondent.

No. 92-1218-CIV-T-17C.

United States District Court,
M.D. Florida,
Tampa Division.

Oct. 3, 1995.

Stuart C. Markman, James E. Felman, Kynes & Markman, Tampa, FL, for petitioner.

Brenda S. Taylor, Attorney General's Office, Dept. of Legal Affairs, Tampa, FL, for respondent.

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

KOVACHEVICH, District Judge.

This cause is before the Court on the Respondent's motion to alter or amend judgment (Docket No. 41). The courts have recognized three grounds for justifying the reconsideration of an order: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice. *Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F.Supp. 656, 665 (E.D.Cal.1986). The respondent relies on the third ground, the need to correct clear error, to justify reconsideration of the previous order.

PROCEDURAL HISTORY

The Petitioner's Writ of Habeas Corpus was referred to Magistrate Judge Elizabeth Jenkins for review of his conviction. The Magistrate Judge recommended denial as to all four (4) grounds. This Court reviewed the Report and Recommendation and reached a contrary conclusion as to grounds III and IV of the Petitioner's claim. As a result, this Court sustained the Petitioner's (Grubbs) right to pursue an appeal in state court based on the claims of ineffective assistance of appellate counsel and failure to comply with the requirements of an *Anders* brief. The State, Respondent, now files a motion to alter or amend the judgment as to grounds III and IV pursuant to Rule 52(c), asking this Court to reconsider the order issued on July 11, 1995 (Docket No. 40).

DISCUSSION

Direct Appeal

The Respondent asserts that appellate counsel can not be found ineffective for failure to file a claim of ineffective assistance regarding trial counsel, on direct appeal, when the claim was not preserved on the record. The Respondent does not offer an explanation as to how a claim of ineffective assistance of trial counsel could or should be preserved on the trial record. This Court is unsure of how Petitioner would have preserved such a claim "on the record". The Court finds the Respondent has not alleged or proven its claim for reconsideration of the opinion previously rendered.

Claims of ineffective assistance of counsel are generally brought by a Rule 3.850 motion; however, these claims may be brought by direct appeal when the ineffectiveness is apparent or obvious from the face of the record. *Stewart v. State,* 420 So.2d 862 (Fla.1982). Upon review, this Court again finds that the ineffectiveness of trial counsel is apparent on the record in this case. Appellate counsel did have the option of bringing this claim by direct appeal; however, a direct appeal is not mandatory. In *Owen v. State,* 560 So.2d 207, 212 (Fla.1990), the Court acknowledged that a claim of ineffective assistance of counsel **may** be raised by direct appeal as opposed to a Rule 3.850 motion. Counsel is not required to do so and may not be found ineffective solely for failure to raise this claim by a direct appeal.

RULE 3.850 MOTION

Appellate counsel had the option of bringing petitioner's claim of ineffective assistance of trial counsel pursuant to a Rule 3.850 motion, as is customarily done. Appellate counsel declined to file either a direct appeal or a Rule 3.850 motion. This Court is still convinced that valid grounds for a claim were apparent on this record, therefore, appellate counsel was ineffective based on the failure to pursue this claim by one of the available procedures.

The Respondent argues that the need for an evidentiary hearing demonstrates that trial counsel's ineffectiveness was not apparent on the record. In essence, Respondent's argument is that the hearing was necessary to determine trial counsel's strategy, which negates this

Court's finding that the ineffectiveness was apparent on the record. The Magistrate Judge conducted the hearing, not this Court. This Court will not second guess the Magistrate Judge as to the reason for holding a hearing. This Court has made an independent, *de novo* review of the record and has determined that trial counsel failed to provide any convincing evidence of competent strategic decisions warranting the conduct of counsel. The Respondent does not persuade otherwise in this motion.

In light of the ineffectiveness apparent on the record, appellate counsel should have pursued this claim. According to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the petitioner must establish that counsel's performance was deficient to the extent that it prejudiced the defense. If the petitioner presents evidence of this deficiency, grounds for a claim of ineffective assistance of counsel are present. As a result, this Court has found that petitioner's claim of ineffective assistance of trial counsel was not frivolous.

PROCEDURAL BAR

Respondent contends that the claim of ineffective assistance of counsel is procedurally barred in this case because it was not raised by direct appeal. Respondent cites to *Suarez v. Dugger*, 527 So.2d 190, 193 (Fla.1988) for this proposition. However, a close reading of *Suarez* reveals that this assertion is incorrect. The Court in *Suarez* acknowledged that although other claims are barred by failure to bring them by direct appeal, a claim based on ineffective assistance of counsel is not procedurally barred. *Id.* at 192. This holding is consistent with the

procedural scheme which allows counsel to file a Rule 3.850 motion in lieu of a direct appeal. Therefore, this claim is not procedurally barred.

REQUIREMENTS FOR AN *ANDERS* BRIEF

When appellate counsel declines to pursue a claim by direct appeal or a 3.850 motion, the courts require appellate counsel to include any arguable grounds that support the petitioner's claim. *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). Appellate counsel failed to comply with this requirement. It is not sufficient to state, as Respondent did in this motion, that appellate counsel is not ineffective because the petitioner proceeded to file a 3.850 motion for ineffective assistance of trial counsel. The prejudice created by appellate counsel's ineffective assistance is not negated by the Petitioner's filing of a *pro se* motion. Appellate counsel failed to assert any and all reasonable grounds for the claim in the *Anders* brief. This resulted in prejudice to the defendant because the state court was not presented with an accurate depiction of the grounds which might support an appeal. Therefore, appellate counsel's failure to comply with the *Anders* requirement does constitute ineffective assistance of counsel according to the standard established by *Strickland*.

In *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), the Supreme Court held that appellate counsel was not ineffective when he selected certain grounds to support an appeal and did not include other "weaker" arguments in the *Anders* brief. The appellate court found that this violated the *Anders* requirement

because counsel abandoned nonfrivolous issues on appeal; however, the Supreme Court reversed and held that counsel had satisfied *Anders* by supporting his client to the best of his ability. *Id.*

The present case is distinguishable because the grounds asserted by the Petitioner, which were not included in the brief by appellate counsel, were not "weaker" arguments. The grounds now asserted by the Petitioner appear to be strong grounds for an appeal based on ineffective assistance of trial counsel. These grounds include trial counsel's failure to object to inadmissible hearsay statements and trial counsel's own solicitation of inadmissible hearsay which was extremely prejudicial to the Petitioner. Appellate counsel's failure to include these apparent and meritorious grounds in the *Anders* brief falls outside the range of reasonable professional assistance.

CONCLUSION

Respondent's motion realleges arguments already addressed by this Court, as well as raising new arguments directed at the holding of this Court.

ORDERED that the motion to alter or amend judgment (Docket No. 41) be denied and the judgment of this Court, dated July 11, 1995 (Docket No. 40) be **reaffirmed.**

DONE AND ORDERED.

Ronald K. GRUBBS, Petitioner,

v.

Harry K. SINGLETARY, Secretary, Department of Corrections, State of Florida, Respondent.
No. 92-1218-Civ-T-17C.

United States District Court,
M.D. Florida,
Tampa Division.

July 11, 1995.

Stuart C. Markman, James E. Felman, Kynes & Markman, Tampa, FL, for petitioner Ronald Keith Grubbs.

Brenda S. Taylor, Atty. Gen. Office, Dept. of Legal Affairs, Tampa, FL, for respondent Harry K. Singletary, Jr.

ORDER

KOVACHEVICH, District Judge.

This cause is before the Court on a Report and Recommendation ("R & R") (Docket No. 37) and Petitioner's Objections thereto (Docket No. 39). The R & R recommends denial of the petition for a writ of habeas corpus. Petitioner is a state prisoner who filed for habeas relief in this Court pursuant to Title 28, United States Code, Section 2254. This Court, under authority of 28 U.S.C. Section 636(b)(1)(B), Rule 72(b) of the Federal Rules of Civil Procedure and Rule 6.02, Local Rules of the Middle District of Florida, referred the petition to United States Magistrate Judge Elizabeth A. Jenkins for all proceedings up to and including the issuance of an R & R.

Section 636(b)(1) states that any party to an R & R may file written objections to the report's proposed findings and recommendations. It further states that "a judge shall make a *de novo* determination of those portions of the specified proposed findings or recommendations to which objection is made." *Gropp v. United Airlines, Inc.*, 817 F.Supp. 1558, 1560 (M.D.Fla.1993). With respect to those findings of the Magistrate Judge not objected to by the parties, this Court has held that the clearly erroneous standard applies. *Id.* at 1562.

Facts

Petitioner Ronald K. Grubbs was convicted on or about May 17, 1988, of two counts of committing a lewd and lascivious act on a child and capital sexual battery involving a child under twelve (12) years. The victim, Veronica Rene Daggett ("Rene"), was a friend of Sunny Russ, the daughter of Astrid Russ. Both Astrid and Sunny were living with Grubbs at the time of the alleged offenses.

According to a videotaped statement by the victim, Petitioner carried her into Sunny's bedroom, where he committed the alleged offenses, after she had fallen asleep next to Sunny on a couch in an adjacent room. At trial, Veronica testified that Petitioner touched her breasts, pulled her underwear down, touched her vagina with his hand and "put his finger in her bottom". She testified that she then hit Grubbs in the face and ran out of the room. She told Sunny what had happened and told

her not to tell anyone. She testified that the offense happened in July or August 1987, and occurred on a conventional single bed with a mattress (T 19-30).

Prior to trial, defense counsel filed a motion for a statement of particulars and the prosecution responded by stating that the offense occurred in 1987. At trial, pursuant to defense counsel's request, the court ruled that the state would have to prove that the offense occurred in July or August, 1987. Although July or August, 1987 were the dates specified in the second amended information, the original information had listed July, 1986 as the time of the alleged crime, and investigative documents pertaining to the case had variously listed times between 1985 to 1987.

Given the disparity in dating the crime, defense counsel attempted to prove that a waterbed, rather than a conventional bed as alleged by Rene, was in Sunny's room when the alleged offense took place.

Sunny Russ testified on both direct and cross-examination that Rene had told her details about the alleged offense. Similarly, Astrid Turner testified concerning what Sunny had revealed to her about her (Sunny's) conversations with Rene. And Aubrey Turner (Rene's father) testified about his conversation with Astrid about the same subject.

In its opening statement, defense counsel raised as a theory of the case that Rene's allegations were prompted by a conversation she had earlier with a girl named Kathleen Briley, a friend of hers and Sunny. Defense counsel elicited the details of this story, that Grubbs had once woken Kathleen when she was staying over at his

house and asked her to kiss him, through direct examination of Astrid.

Procedural History

Petitioner Grubbs was tried in the Twelfth Judicial Circuit, in and for Manatee County, Florida. He received a sentence of life imprisonment with a twenty-five (25) year minimum mandatory term on the sexual battery charge and a concurrent fifteen (15) year term on the other charges. The trial court denied a motion for a new trial on June 15, 1988.

On November 2, 1988, an assistant public defender, Andrea Steffen, filed an appeals brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Pursuant to *Anders*, Steffens requested permission from the Second District Court of Appeals to withdraw as counsel of record on the grounds that there were no reversible errors committed during the trial, but did direct to the court's attention four arguable grounds for appeal. After the *Anders* brief was filed, the State filed an answer, and Grubbs filed a *pro se* reply brief. In a *per curiam* decision filed June 28, 1989, the Second District Court of Appeals affirmed Grubbs' conviction without issuing an opinion.

On September 21, 1989, Grubs [sic] filed a *pro se* Petition for a Writ of Habeas Corpus in the Second District Court of Appeals, which was denied the same month. On April 6, 1990, he filed *pro se* his first Petition for a Writ of Habeas Corpus in this court which dismissed the petition without prejudice for failure to exhaust the issues raised in state court. Thereafter,

Grubbs returned to state court, filing a second state court Habeas Petition in the Second District Court of Appeals which was denied January 24, 1991.

On June 26, 1991, this Court dismissed his second federal court Habeas petition, without prejudice, after Grubbs requested permission to withdraw the petition so as to pursue his unexhausted claims in the state courts.

Thereafter, on July 5, 1991, Grubbs' filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. This motion was denied by the trial court without an evidentiary hearing, and the denial was affirmed by the Second District Court of Appeals without an opinion.

On August 25, 1992, counsel for Petitioner Grubbs filed a third federal Petition for a Writ of Habeas Corpus, claiming four (4) grounds for relief. Grounds I and II asserted the violation of Grubbs' sixth amendment right to effective assistance of counsel at the trial level. Grounds III and IV alleged ineffective assistance of appellate counsel and failure to comply with the requirements of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), by both Grubbs' appellate counsel and the state appellate court itself.

A United States Magistrate Judge entered a Report and Recommendation on October 15, 1993, again recommending dismissal ~~without~~ prejudice, based on the court's finding that Grubbs had still not exhausted state remedies with respect to Grounds II and IV of his petition. Thereafter, Grubbs filed a motion for reconsideration of the Report and Recommendation and, based on

the submissions of the parties, the Report and Recommendation was withdrawn because the parties agreed that Grounds II and IV of the petition had been procedurally defaulted.

After the withdrawal of the Report and Recommendation, the Magistrate Judge ordered an evidentiary hearing on all four grounds for relief. In the hearing, held on April 21, 1994, Grubbs argued that he had properly shown cause and prejudice for his default with respect to Grounds II and IV. The parties also argued the merits of all claims.

Following the evidentiary hearing, the Magistrate Judge entered a new Report and Recommendation, denying Habeas relief. The Magistrate Judge recommended a finding that Grubbs failed to show adequate cause for his procedural defaults in Grounds II and IV, and failed to demonstrate a constitutional violation with respect to grounds I and III.

Grubbs objects to the conclusions of the *Report and Recommendation*. With respect to Grounds II and IV, he asserts that he has shown adequate cause for his procedural failure to present his claims to the state courts. As to Ground III, he claims an *Anders* violation by his appellate counsel representing a violation of his sixth amendment right to counsel. Since Grubbs presents no objections to the Magistrate Judge's conclusion that he failed to demonstrate constitutional inadequacy of trial counsel in his Ground I claims, the Court adopts the Magistrate Judge's recommendations as to Ground I.

To be entitled to habeas corpus relief, a state prisoner must normally establish that he has exhausted state

remedies, i.e., that he has "fairly presented" to the state courts the "substance" of his federal claim. *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982), *Picard v. Connor*, 404 U.S. 270, 277-278, 92 S.Ct. 509, 513-514, 30 L.Ed.2d 438 (1971). If he fails to exhaust state remedies, his petition must be dismissed without prejudice pursuant to *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). On the other hand, if he fails to present his claims to the state courts in a timely manner, and procedurally defaults the claims, the prisoner must show "cause" and "prejudice" before he can be entitled to habeas corpus relief. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Ground II – Ineffective Assistance of Counsel.

Grubbs' alleges two (2) general categories of ineffective assistance of counsel at the trial level. The first category concerns the introduction by defense counsel of testimony that Grubbs had committed a prior similar bad act, the alleged attempt by Grubbs to kiss Kathleen Brier [sic], a friend of Rene. After defense counsel "opened the door" by eliciting this testimony through his own witness, Petitioner asserts the prosecution exploited the evidence in cross-examination and final argument, and brought in the alleged victim of the prior bad act as a rebuttal witness. The defense never objected to the prosecution's use of the evidence, and never followed through on the premise of its opening statement, that it would develop a coherent theory to explain, through trial testimony, how Kathleen's alleged statement influenced Rene.

The second category consists of instances where the defense failed to object when the prosecution elicited hearsay testimony recounting the victim's version of the offense, and elicited similar hearsay testimony on its own.

A petitioner asserting ineffective assistance of trial counsel must bear the difficult burden of establishing that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In *Strickland*, the Court announced a two part test for considering such claims, holding that a petitioner must establish: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. *Id.* at 687, 104 S.Ct. at 2064.

Prejudice exists when "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068.

The standard for performance of counsel is that of reasonably effective assistance in light of all the circumstances, *Id.* at 689, 104 S.Ct. at 2065, but the reviewing court must make "every effort to eliminate the distorting effects of hindsight . . . [so as] to evaluate the conduct from counsel's perspective at the time." *Id.* The petitioner must overcome a presumption that the challenged action was employed for strategic or tactical reasons. *Id.* Moreover, this circuit amplified the *Strickland* requirements in

its holding that effective assistance does not necessarily mean errorless assistance and that counsel's record must be judged in light of the entire record rather than specific actions. *Green v. Zant*, 738 F.2d 1529, 1536 (11th Cir.), *cert. denied*, 469 U.S. 1098, 105 S.Ct. 607, 83 L.Ed.2d 716 (1984).

Although Grubbs raised the issue of ineffective assistance of counsel in the state court in his Rule 3.850 motion, he did not assert the particular instances of ineffective assistance alleged in the habeas petition at issue here. As noted earlier, in order to be entitled to habeas relief, a petitioner must exhaust state remedies, i.e. he must show that he has "fairly presented" to the state courts the "substance" of his federal claim. *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982).

In a series of decisions which include *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), the Supreme Court has fleshed out the content of the exhaustion requirement with respect to both procedural and substantive issues. In particular, *Tamayo-Reyes* allows federal courts to deny an evidentiary hearing to any habeas petitioner who is unable to show "cause and prejudice" for his failure to fully develop issues of material fact in prior state proceedings. This "cause and prejudice" standard had been applied by the court earlier only in reference to purely procedural defaults, i.e. a state's denial of a petitioner's claim because of his failure to raise it in a time frame in accordance with the state's rules of procedure. See, for example *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1972).

The Magistrate Judge would deny Grubbs petition on the ground that he failed to meet the burden of proving cause and prejudice on the basis of a standard derived from *Tamayo-Reyes*, as announced by the Eleventh Circuit in *Footman v. Singletary*, 978 F.2d 1207 (11th Cir.1992).

In *Footman*, the Eleventh Circuit overturned a district court ruling on the narrow facts of the case, but upheld the lower court's finding that a habeas petitioner is normally required to present in state court all instances of ineffective counsel he later presents in federal court. The *Footman* court, in discussing the relationship between *Tamayo-Reyes* and the facts of its case, said:

> In *Tamayo-Reyes* the [Supreme] Court placed great emphasis on full factual development of a post-conviction petition in the state courts. Applying the *Tamayo-Reyes* language to the exhaustion situation, allowing a habeas petitioner to allege a single instance of ineffective assistance in his state post-conviction proceedings and then proceed to federal court to allege additional instances would be contrary to the State's "full and fair opportunity to address the claim on the merits". The State would never have the benefit of evaluating a claim using a fully developed set of facts. This would not be the "serious and meaningful" exhaustion of claims that Congress intended [when it enacted the federal habeas statute].

Id. at 1211.

As the Magistrate Judge has suggested, the holding in *Footman* would appear to require a ruling that Grubbs failed to meet the burden of giving to the state its "full and fair opportunity to address the case on the merits". If

so, Grubbs has either failed to exhaust his state claims or procedurally defaulted. However, Florida courts follow the rule that where an initial motion for post-conviction relief raises a claim of ineffective assistance of counsel, successive motions raising additional grounds may be denied. See, e.g., *Spaziano v. State*, 545 So.2d 843, 844-845 (Fla.1989); *Card v. Dugger*, 512 So.2d 829, 830-831 (Fla.1987). (See also Florida Rule of Criminal Procedure 3.850(f): "A second or successive motion may be dismissed . . . if new and different grounds are alleged, [and] the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.") Since federal habeas courts must respect state procedural rules (see, e.g. *Lindsey v. Smith*, 820 F.2d 1137, 1144 (11th Cir.1987), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1327, 103 L.Ed.2d 595 (1989)), it follows that this Court must proceed on the assumption that Grubbs has procedurally defaulted his state claim.

If Grubbs has defaulted, he is subject to the requirements of *Wainwright v. Sykes* and must show cause and prejudice to obtain review on the merits of his claim of ineffective assistance of trial counsel. Although Grubbs cites *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) for the proposition that ineffective assistance of appellate counsel will satisfy the *Sykes* cause requirement, *Murray* goes on to say that the exhaustion of state remedies requirement generally demands that a *Strickland* claim to excuse a default must first be presented to the state courts as an independent claim. *Id.* at 488, 489, 106 S.Ct. at 2645, 2646. Thus Grubbs' failure to

assert all instances of ineffective assistance of trial counsel at the state court level will not be excused by the alleged inadequacies of his appellate attorney. Furthermore, as the Magistrate Judge points out, there is no logical connection between Grubbs' failure to assert his claims in his 3.850 motion and anything the appellate attorney may have done or failed to do in her *Anders* brief.

Although *Footman* follows *Tamayo-Reyes* in arguing that all instances of ineffective assistance of trial counsel should be laid out at the state court level, dicta in *Footman* leaves open a possible alternative to these stringent requirements. According to the court, "[w]e decline to address the continuing vitality of the doctrine that a petitioner need not present all instances of ineffective assistance of counsel to the state court before proceeding to federal court when the state court has reviewed the entire record to evaluate the ineffective assistance claim. *See*, e.g. *Vela v. Estelle*, 708 F.2d 954 (5th Cir.1983), *cert. denied sub nom., McKaskle v. Vela*, 464 U.S. 1053, 104 S.Ct. 736, 79 L.Ed.2d 195 (1984)." *Footman* at 1211, n. 4. Grubb asserts that, like the habeas petitioner in *Vela*, all of his federal allegations of ineffective assistance of counsel were "readily discernible from the review of the entire record which the [state] court was obligated to carry out." *Vela* at 960. Even if that is true, however, there is no indication that the state court did more than review the entire trial record for the express purpose of evaluating Grubbs' specific claims. Unlike the situation in *Vela*, the Florida court made no affirmative findings that petitioner received effective assistance of counsel based on its

review. Therefore this Court adopts the Magistrate Judge's recommendation as to Ground II.

Ground III and IV – Anders Violation

Petitioner argues in Grounds III and IV that his appellate attorney and the Florida court of appeals failed to comply with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Although Respondent argues that Ground IV is procedurally defaulted and the Magistrate Judge concurs with this evaluation, Grounds III and IV are effectively linked since both refer to the procedural requirements of *Anders*.

Anders provides a procedure whereby a court-appointed appellate attorney may withdraw from representation of a client whose claims, in the attorney's opinion, are entirely frivolous. *Anders* allows the attorney to seek permission from the court to withdraw, but only if he accompanies his request by a "brief referring to anything in the record that might arguably support the appeal." *Anders* at 744, 87 S.Ct. at 1400. In performing this task, and even though he believes his client's case is without merit, the attorney is still obliged to remain within the role of advocate. "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." *Id.* The Eleventh Circuit has amplified these requirements in stating, "at this stage of the proceeding it is not for the lawyer to act as an unbiased judge of the merit of particular grounds for appeal. He or she is required to set out *any* irregularities in the trial process or

other potential error which . . . [might] be arguably meritorious." *United States v. Blackwell*, 767 F.2d 1486, 1487-1488 (11th Cir.1985) (emphasis in original).

Petitioner asserts that, although appellate counsel raised four (4) arguable grounds for appeal pursuant to *Anders*, she failed to argue these grounds in the manner of an advocate as *Anders* requires. For example, appellate counsel's first issue, which concerns whether trial court erred in failing to grant Grubbs' motion for a directed verdict, contains no trial testimony whatsoever favorable to Grubbs' case. It fails to mention that two (2) witnesses (Astrid and Sunny Russ) testified that the crime could not have taken place during the time period named in the amended information, nor that Grubbs had denied the offense on the witness stand.

Similarly, the third issue, concerning the trial judges' denial of Grubbs' motion for a new trial, fails to mention that Grubbs' motion – which concerned his attempt to "establish that a photograph introduced into evidence at trial had been taken in December 1986" – had significant evidentiary value. The photograph, if an accurate date for it could be established, would buttress the defense argument that the crime, which Veronica testified had taken place on a conventional bed in Sunny's room, could not have occurred in that manner because Sunny's conventional bed had been replaced by a waterbed by the time of the alleged offense.

Petitioner further asserts that appellate counsel failed to raise ineffective assistance of trial counsel as an arguable ground for appeal, and that this in itself constitutes a

violation of *Anders*. Petitioner presented an expert witness at the evidentiary hearing who testified that, although "99 percent of these kinds of claims . . . are not susceptible to a direct appeal", the facts of the present case constitute an exception since all instances of ineffective assistance of counsel are in the record. (Docket 32, p. 73). The witness testified that appellate counsel's failure to raise in her *Anders* brief the failure by trial counsel to object to the admission of hearsay and double hearsay testimony recounting Rene's story of the alleged crime fell "below the standard of a reasonably effective appellate counsel". (Docket 32, p. 73). He also testified that the introduction of Kathleen Briley's prior bad act testimony, regardless of the rationale, could not be characterized as a "[defense] strategy that fails, this is not a strategy." (Docket 32, p. 91).

This Court disagrees with the Magistrate Judge and agrees with Petitioner that appellate counsel's *Anders* brief fell below the standard of a reasonably effective appellate counsel.[1] Although Petitioner's claim of

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[1] Appellate counsel's first arguable issue in her *Anders* brief reads in its entirety, "[w]hen a defendant moves for a judgment of acquittal he admits all facts in evidence adduced and every conclusion to the state reasonably inferred therefrom. *Garmise v. State*, 311 So.2d 747 (Fla. 3d DCA 1975), *cert. denied*, 429 U.S. 498 [998], 975 [97] S.Ct. 524, 50 L.Ed.2d 608 (1976). The evidence presented by the state through Veronica Daggett was that she was eleven years old when Appellant had touched her breasts and vaginal area and inserted his finger into her rectum."

The appellate counsel's juxtaposition of the evidence most damaging to Grubbs with a one line recitation of the relevant legal standard for a directed verdict is highly effective rhetoric, but its effect is to persuade against Grubbs' interests, not in

ineffective assistance of trial counsel (Ground II) was procedurally defaulted, this Court has reviewed the trial transcript as part of its *de novo* review of the R & R. The Court also reviewed Petitioner's Objections to the R & R, and the transcript of the evidentiary hearing.

The Court concludes that the failure of trial counsel to object to hearsay, his eliciting of hearsay testimony implicating the accused on direct examination, and introduction of prior bad act evidence against Grubbs, all constitute instances of ineffective assistance of trial counsel. More specifically, however, they constitute a violation of the requirements of *Anders*. As noted *supra*, *Anders* states that, when an appellate counsel requests leave to withdraw from the representation of defendant whose appeal seems to him or her frivolous, the counsel must still submit a brief advocating any arguable grounds for appeal, however tenuous.

Although Grubbs' appellate counsel submitted a brief containing four (4) arguable grounds for appeal, none of the grounds came close to even hinting at the genuine grounds for appeal which were apparent in the trial transcript.

However, that does not end the inquiry. Although the Eleventh Circuit "has applied the Supreme Court's [*Strickland v. Washington*] test . . . to guide its analysis of ineffective assistance of appellate counsel claims", *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir.1991), the question remains whether *Anders* violations are in fact instances of

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favor of them. Her brief reads more like an *amicus* brief for the state than one for her client.

ineffective assistance of appellate counsel such as fall under *Strickland*.

In *Penson v. Ohio*, 488 U.S. 75, 84, 109 S.Ct. 346, 352, 102 L.Ed.2d 300 (1988), the Supreme Court stated,

> [O]nce a court determines that the trial record supports arguable claims, . . . the criminal appellant is entitled to representation. The [state court's] determination that arguable issues were presented by the record, therefore, created a constitutional imperative that counsel be appointed.
>
> [I]t is important to emphasize that the denial of counsel in this case left petitioner completely without representation during the appellate court's actual decisional process. This is quite different from a case in which it is claimed that counsel's performance was ineffective. . . . It is therefore inappropriate to apply either the prejudice requirement of *Strickland* or . . . harmless error analysis.

Id. at 88, 109 S.Ct. at 354.

The facts in *Penson* differ in several key ways from the present case. Grubbs' appellate counsel filed a brief that met the nominal requirements of *Anders*, whereas the brief filed by Penson's appellate counsel was nothing more than "a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief". *Id.* Furthermore, in *Penson*, the state appellate court itself had noted that the record contained arguable issues, something that the Florida courts did not do in this case.

Nevertheless, the resemblances between the present case and *Penson* are more fundamental than the contrasts. The brief filed by Grubbs' appellate attorney was actually less helpful to the petitioner in this case than the motion filed by Penson's attorney, and may have been affirmatively prejudicial. And, whereas the state courts failed to find any arguable grounds for appeal in the present case, this Court did.

The essential meaning of *Penson* is that "where issues of arguable merit are present, as they are here . . . appellate review cannot take place without a fully adversarial briefing by counsel." *Evans v. Clarke*, 868 F.2d 267, 269 (8th Cir.1989). And, "[b]ecause the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage . . . the presumption of prejudice must extend as well to the denial of counsel on appeal." *Penson*, 488 U.S. at 88, 109 S.Ct. at 354.

Since this Court declines to accept the Magistrate Judge's recommendation that Petitioner's allegations of an *Anders* violation by his appellate counsel is without merit, it follows that Grubbs is not required to show prejudice to be entitled to a new appeal before the state appellate court. Accordingly, it is

ORDERED that the Report and Recommendation be **ADOPTED** and the Petitioner's Objections **OVERRULED** as to Petitioner's Ground I and Ground II claims; the Report and Recommendation be **DENIED** and the Petitioner's Objections be **SUSTAINED** as to Petitioner's Ground III and IV claims; and the Florida Second District Court of Appeals be directed to grant Petitioner the

opportunity for a new appeal on the basis of his claims of ineffective assistance of trial counsel.

DONE AND ORDERED.